No. 961972 JUN 10 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD T. DERTHICK and DERTHICK ASSOCIATES, INC., STANLEY ROBBINS and STAN ROBBINS AND ASSOCIATES, INC., SLAYTON ASSOCIATES, INC.,

Petitioners,

—v.—

BASSETT-WALKER, INC. and V. F. CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower courts violated summary judgment procedures by determining that petitioners were not "employees" for the purpose of the Age Discrimination in Employment Act ("ADEA"), rather than treating petitioners' showing as giving rise to disputed fact issues required to be determined at trial.

2. Whether the summary judgment dismissal of litigation commenced by former sales representatives notwithstanding the existence of multiple disputed fact issues is contrary to applicable summary judgment procedures.

LIST OF PARTIES TO PROCEEDINGS BELOW

RICHARD T. DERTHICK and DERTHICK ASSOCIATES, INCORPORATED;

Petitioners,

v.

BASSETT-WALKER, INCORPORATED and V F CORPORATION,

Respondents.

STANLEY ROBBINS and STAN ROBBINS AND ASSOCIATES, INCORPORATED,

Petitioners,

v.

BASSETT-WALKER, INCORPORATED and V F CORPORATION,

Respondents.

SLAYTON ASSOCIATES, INCORPORATED

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No. ___-_____

In the Supreme Court
of the
United States

October Term, 1996

RICHARD T. DERTHICK and DERTHICK ASSOCIATES, INCORPORATED; STANLEY ROBBINS and STAN ROBBINS AND ASSOCIATES, INCORPORATED; SLAYTON ASSOCIATES, INCORPORATED.

Petitioners,

v.

BASSETT-WALKER, INCORPORATED and V F CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Richard T. Derthick, Derthick Associates, Incorporated, Stanley Robbins, Stan Robbins and Associates, Incorporated, and Slayton Associates, Incorporated, plaintiffs in separate proceedings below, respectfully request the issuance of a writ of certiorari to review the judgment and decision of the United States Court of Appeal for the Fourth Circuit filed on February 12, 1997 and the denial of the petition for rehearing and suggestions for rehearing en banc dated March 12, 1997.

OPINIONS BELOW

The unreported decision of the United States Court of Appeals for the Fourth Circuit, Derthick Assocs. v. Bassett-Walker, Inc., No. 95-2230, No. 95-2231, No. 95-2232, 1997 U.S. App. LEXIS 2302 (4th Cir. Feb. 12, 1997), is set forth in the Appendix at pages 2 to 13. The United States District Court for the Western District of Virginia (Danville Division), Derthick v. Bassett-Walker, Inc., Civil Action No. 94-0026-D, Civil Action No. 94-0027-D, Civil Action No. 94-0028-D, 904 F.Supp. 510 (W.D.Va. 1995), is set forth in the Appendix at pages 14 to 45. The Order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing and suggestion for rehearing en banc is set forth in the Appendix at pages 46 to 48. The Mandate of the United States Court of Appeals for the Fourth Circuit is set forth in the Appendix at page 49.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1997. (a 2-13) The order denying plaintiffs' petition for rehearing and suggestion for rehearing en banc was entered on March 12, 1997. (a 46-48) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA") and

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[1] Citations followed by the suffix "a" refer to the Appendix to the Petition for Certiorari which is filed herewith. Citations preceded by the prefix "JA" refer to the Joint Appendix filed in the United States court of Appeals for the Fourth Circuit.

particularly 29 U.S.C. § 630(f), Chapter 93A Massachusetts General Laws, Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 and the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 and the Virginia Conspiracy Statute, Va. Code. Ann. § 18.2-499(A). The text of the statutes is set forth in the appendix at pp. 50 to 54.

STATEMENT OF THE CASE

These cases involve the use of summary judgment procedures to dismiss litigation notwithstanding the existence of disputed fact issues as to whether a company is an "employer" under the ADEA, and involving determination of allegations of violations of tortious interference and fraudulent business practices under choice of law principles.

As shown in opposition to defendants' summary judgment motion, respondents Bassett-Walker, Inc. ("Bassett-Walker) and V.F. Corporation ("V.F.") terminated their force of veteran sales representatives and replaced them with younger company employees under the guise of a "business restructuring." The action, allegedly taken for "legitimate business reasons," not only wiped out the twenty-year careers of petitioners who had been highly successful in developing sales of more than $100,000,000 per year for Bassett-Walker, but also proved to be a fiasco, viewing the facts and inferences most favorable to the nonmoving party in connection with respondents' summary judgment motion as required under Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). (JA 530-57; 902-905; 914-21; 929-32; 943-63; 1312-33; 1347-69; 1940-8; 1967)

As part of this "restructuring," respondents conspired with one of their customers, the Target Stores ("Target") granting it preferences that deprived the petitioners of their commissions and reputations alike while simultaneously

conspiring, as a quid pro quo to a conspiring customer with a dominant position in the market, to deprive competitive customers of merchandise by reneging upon their projected orders in 1989, the year of petitioners' termination.[2] (JA 696-7; 903; 1323-41)

Respondents issued their surprise termination announcement at a sales meeting in June 1989, in which they terminated all of their veteran sales representatives. (JA 702; 906; 1317) Relationships with sales representatives that had been in effect for over twenty years were unilaterally ended, and they were replaced with younger and less qualified employees.

Petitioners Stanley Robbins and Stan Robbins and Associates, Inc., had served respondents in the New England States from the Boston area from 1968 (JA 1049-51); petitioner Slayton Associates, Inc., had served respondents in Illinois, Indiana, Iowa, Missouri, and Minnesota from 1967 (JA 1414-18); and petitioners Richard Derthick and Derthick & Associates, Inc., had served respondents in Michigan, Ohio, and Western Pennsylvania from 1968 (JA 619).

As compensation, petitioners received commissions on sales. (JA 1909) Due in large part to the success of petitioners' efforts, Bassett-Walker, which had been an obscure company, with insignificant sales in 1965, rose to a position of prominence in the fleeceware industry (JA 900-01), with national sales reaching approximately $300 million. (JA 500) Petitioners' territories produced one-third of that figure, or $100 million, in the year of their termination. (JA 557)

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[2] The respondents knowingly subjected those competitors to substantially higher prices and less favorable terms as a result of the conspiracy with Target Stores. (JA 693)

Although the district court acknowledged that it must "view the facts and/or reasonable inferences in a light most favorable to the non-moving party," the petitioners (JA 1916), it failed to do so. Furthermore, the Fourth Circuit Court of Appeals failed to apply the de novo standard as required

The courts below, in deciding to dismiss the cases on summary judgment, improperly resolved, in a manner not favorable to the non-moving parties, contrary to Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), the issue of whether the respondents' action was the outgrowth of a "legitimate business reasons" (JA 1925), which constitutes a disputed fact issues.

Further, in denying plaintiffs' claims the district court incorrectly stated that "there is no writing, only nonspecific, vague and ambiguous statements" the commitments of Bassett-Walker in dealing with the petitioners and others. (JA 1922) In doing so, the district court failed to note that the "Company Creed" (JA 1313-4) was violated in all respects and the treatment that was accorded to petitioners as shown by the affidavit of Wendel Slayton (JA 1313-1314):

> "23. The "Company Creed" of Bassett-Walker, which was given to the sales representatives during their employment with Bassett-Walker (Slayton Appendix, Exhibit D) states:
>
> > "Bassett-Walker will operate its business to achieve and maintain a standard of excellence. The conduct of business and relationships with employees, customers, and all other associations shall be on an

> honest, fair and equitable basis while providing products of superior value at a fair price." (Emphasis added.)
>
> "24. As a result of the above statements ["Company Creed"] and the pattern and practice of the industry, I made the decision to continue to work for Bassett-Walker. My understanding was that, in return for my continued efforts on behalf of Bassett-Walker, the agreement between myself and Bassett-Walker would be not terminable except for cause."

The violation of the "Company Creed" as quoted above is shown in detail in the affidavit of Robert G. Dykstra submitted on behalf of petitioners (JA 1662). The Dykstra affidavit shows that the accounts of petitioners were cut back substantially by respondents in the amounts that they were permitted to order in 1989. Petitioners were lied to by respondents in being told that the cutbacks were the outgrowth of a "production problem and a demand problem" (JA 1125; 1665-6), when the real reason was because of a discriminatory and preferential commitment made by respondents to Target Stores.

As stated in Mr. Dykstra's affidavit the deceptive acts and practices of respondents caused the withholding of over $25 million dollars in merchandise from petitioners' accounts from their merchandise needs as projected for 1989. (JA 1670-1)

The drastic effect of the cutbacks is shown in a "smoking gun" document generated by respondent Bassett-Walker. (JA 1807; 1671) Injury to petitioners' accounts causing a serious loss of commissions to petitioners (estimated to be $500,000 in 1989) is shown. (JA 1671)

The reduction in the amounts that Mr. Slayton was allowed to sell his accounts was approximately $14,500,000.00; the reduction for Mr. Derthick's accounts was over $7,000,000.00; and the reduction in the amount needed by Mr. Robbins' accounts was approximately $4,835,664.00, in 1989, at a time when the petitioners were still functioning as sales representatives. (JA 1671)

This petition involves three cases that were filed in 1990 and 1991 in the Southern District of New York. (JA 1906)

The three cases were consolidated for the purposes of discovery, which was conducted in the Southern District of New York, and dispositive motions, but not for trial. (JA 1906)

The three cases were transferred to the Western District of Virginia by an Order dated April 7, 1994. (JA 1906)

The district court granted the motion of respondents for summary judgment and dismissed the cases by a Memorandum Opinion filed May 18, 1995, and an Order entered on the same date. (JA 1903)

The Fourth Circuit Court of Appeals, in an unpublished per curiam opinion dated February 12, 1997, affirmed the district court's decision of dismissal. The Fourth Circuit Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc in an order dated March 12, 1997. A Mandate from the Fourth Circuit Court of Appeals was issued on March 20, 1997.

The three complaints allege the causes of action summarized below:

(1) Verified Complaint for Richard T. Derthick and

Derthick Associates dated August 10, 1990 (JA 615): **COUNT I** (Age Discrimination and Violation of the ADEA); **COUNT II** (Breach of Contract); **COUNT III** (Conspiracy Constituting Intentional Interference with Contractual and Advantageous Relationships); **COUNT IV** Conversion of Valuable Property Rights to Commission on Sales from Customers and Accounts based Upon Their Restocking and Reordering Goods and Products from Bassett-Walker).

(2) Complaint for Stanley Robbins and Stan Robbins Associates (JA 1047): **COUNT I** (Age Discrimination and Violation of the ADEA); **COUNT II** (Unfair or Deceptive Acts or Practices, Misappropriate of Trade Secrets, Customer Lists, and Customer Information as an Outgrowth of a Conspiracy to Cheat Plaintiffs out of Their Business and Livelihood and Discriminate Customers and Smaller Accounts, in violation of Chapter 93A of the Massachusetts General Laws); **COUNT III** (Wrongful Termination Contrary to Massachusetts Law); **COUNT IV** (Breach of Contract); **COUNT V** (Tortious Interference (a) By Allocating Merchandise to Other Accounts on a Preferential and Unlawful Basis, (b) By-passing plaintiffs' in Dealing with Their Accounts, and (c) By Terminating Plaintiffs, Maliciously Conspiring with Others to Refuse to Deal with Plaintiffs, so that Defendants could Drive Plaintiffs out of Business, Constituting Tortious Interference); **COUNT VI** (Conversion of Property Rights to the Expectancy of Commissions).

(3) Verified Complaint of Slayton Associates (JA 1413); **COUNT I** (Breach of Contract); **COUNT II** (Violation of Illinois Sales Representatives Act); **COUNT III** (Unfair Trade Practices Causing Injury to Plaintiffs and Consumers Generally in Violation of Illinois Deceptive Trade Practices Act and Consumer Fraud and Deceptive Business Practices Act); **COUNT IV** (Tortious Interference); and **COUNT V** (Conversion of Property Rights to and Expectations of

Continued Commissions in Violation of Fiduciary Duties).

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF THE PROPER TEST FOR DETERMINING WHO IS AN "EMPLOYEE" UNDER THE ADEA WARRANTS REVIEW

Review of the question of what constitutes an "employee" under the Age Discrimination in Employment Act ("ADEA") is requested in light of the conflicting standards applied by the Circuits, and in particular, the conflict between the summary judgment dismissal affirmed by the United States Fourth Circuit Court of Appeals, and decisions from the other Circuits cited below.

The definition of "employee" in the ADEA is uninstructive, providing only that an employee is "an individual employed by an employer." 29 U.S.C. § 630(f).

In instances such as here, in which the statutory definition is unhelpful, this Court has established a presumption that Congress "means an agency law definition for 'employee' unless [the statute] clearly indicates otherwise." Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344, 1349 (1992) (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)) (for common law definition of "employee' courts should look to general common law of agency rather than the laws of agency of any particular state).

The district court's dismissal of the complaints affirmed by the Fourth Circuit on defendants' motion for summary judgment concluded that the plaintiffs were independent contractors rather than employees covered by the ADEA, 29 U.S.C. § 630(f). (a 50)

The district court's decision, however, reveals the existence of disputed fact issues not properly decided on summary judgment.

The district court based its decision of dismissal upon what it called "A close examination of the relationship between the parties," and having done so, stated that "Bassett-Walker did not exercise the kind of control required to make the commissioned sales representatives employees." (a 29; emphasis added.)

However, such decisions on disputed fact issues, involving the "kind of control" that would or would not cause an employment relationship to exist involved disputed fact issues not properly decided on a motion for summary judgment.

In affirming such determination of dismissal of the actions, the Fourth Circuit's decision is contrary to the Eleventh Circuit case of Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1497 (11th Cir. 1993), which states that such disputed issues of material fact as are here involved may not be resolved by a grant of summary judgment. As the opinion states (3 F.3d at 1497):

> "Under either test [hybrid or traditional common-law agency test], therefore, the district court erred by resolving a disputed issue of fact regarding the degree of control exercised by Honeywell over the manner in which Daughtrey performed her services. The District Court granted summary judgment in favor of Honeywell on the ADEA claim for Daughtrey's 1933 termination based solely on her status as an independent contractor. We reverse this judgment in light of the genuine dispute of material fact regarding Honeywell's authority

> over the manner and means by which Daughtrey discharged her duties under the consultant agreement." (Emphasis added.)

Summary judgment is particularly inappropriate with respect to disputed fact issues in discrimination cases. As stated in Gallo v. Prudential Residential Services L.P., 22 F.3d 1219, 1123 (2d Cir. 1994):

> ". . . when deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue."

See also Washington v. Lake Country, Ill., 969 F.2d 250, 254 (7th Cir. 1990) ("Summary judgment generally should be treated with special caution in discrimination cases.").

Similarly Hoosier Home Improv. Co. v. United States, 350 F.2d 640 (7th Cir. 1965), which holds that determination of an employer-employee relationship involved issues "of fact that [were] properly submitted to the jury:

> "It is not difficult to see that the term 'employees' embraces a wide range of persons . . . . Between [the] clear cases is a grey area . . . where the trier of facts must be called upon to make the determination."

The factual nature of such a determination is emphasized in Frankel v. Bally, Inc., 987 F.2d 86 (2d Cir. 1993), in which a district court's dismissal of the plaintiff's ADEA claim was vacated on appeal. The district court had

dismissed the plaintiff's claim on the basis that the plaintiff was an independent contractor rather than an employee, but the Second Circuit, in reversing such decision, Frankel v. Bally stated (987 F.2d at 91):

> ". . .the corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA. Indeed, no per se rule applies in such circumstances." (Emphasis added.)

As stated in Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 112 S. Ct. 1344 (1992), that there is

> "no shorthand formula or magic phrase that can be applied to find the answer . . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." (Emphasis added). 112 S.Ct. at 1349.

The showing made by plaintiffs included the deposition taken of Mr. Robert Dykstra on May 6, 1992.[3]

Dykstra had worked with plaintiff Derthick, and then, after the sudden termination of the sales representatives, was hired as an employee by Bassett-Walker.

Bassett-Walker does not deny that Dykstra was an employee after he was put on a salary basis. However, in terms of the nature of the functions performed, and the significant

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[3] Pertinent portions of the deposition are set forth in the Appendix submitted herewith at pages 55 to 64.

elements of control exercised by respondents, Dykstra indicated that the job was functionally the same both before and after the restructuring took place. (a 55-64)

The issue of "control" involved in the determination of the existence of an employment relationship presents a disputed fact issue that should not have been decided on summary judgment, see Garcia v. Copenhaver, Bell & Associates, 104 F.3d 1256 (11th Cir. 1997), particularly when doing so negates the availability of the applicable remedial mechanisms of the ADEA. See Robinson v. Shell Oil Company, 519 U.S. ___, 117 S.Ct. 843 (1997).

The granting of dismissal by way of summary judgment by the courts below conflicts with the Eleventh Circuit's decision in Garcia v. Copenhaver, Bell & Associates, 104 F.3d 1256 (11th Cir. 1997).

Garcia states that, for the purpose of the ADEA, "because the Court found the central issue to both the hybrid test and the agency test is the 'hiring party's right to control the manner and means by which the work is accomplished," when there are "disputed facts concerning the amount of control" exercised, "we cannot rule as a matter of law that Garcia is an independent contractor. Therefore, the proper ruling is to deny [the] . . . motion to dismiss . . . and allow the jury to decide if Garcia is an 'employee'. . . ." Garcia v. Copenhaver, Bell & Associates, supra, 104 F.3d at 1266.

On motions for summary judgment, facts and reasonable inferences therefrom must be drawn in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The issue of whether or not the petitioners were employees is an element of their ADEA claim and in light of the disputed fact issues regarding the "kind of control"

exercised over them by respondents, the district court therefore was required to deny the motion for summary judgment and submit the issue to a jury. Garcia, supra, 104 F.3d at 1266-1267.

II. THE OPINION BELOW INCORRECTLY APPLIED CHOICE-OF-LAW PRINCIPLES TO DISPUTED FACT ISSUES

The decision below affirmed the incorrect analysis performed by the district court of the choice-of-law question under both Massachusetts and Illinois law. Such misapplication denies the Robbins petitioners and Slayton & Associates their right to pursue actions under the Massachusetts Unfair Trade Practices Act and the Illinois Uniform Deceptive Trade Practices Act and the Consumer Fraud and Deceptive Business Practices Act, respectively.

Petitioners Robbins and Stan Robbins and Associates asserted claims under the Massachusetts Unfair Trade Practices Act. In reliance upon Worldwide Commodities v. J. Amicone Co., 630 N.E.2d 615 (1994), the district court determined that the Robbins petitioners' Massachusetts claims were barred because of the district court's incorrect conclusion that Virginia Law applied thereunder. (a 8, 26)

However, such reliance by the district court is misplaced. The decision in Worldwide Commodities does not dictate that Virginia law apply. The decision in Worldwide Commodities was dependent upon the choice-of-law clause contained in the contract at issue in that case. The Court concluded (630 N.E.2d at 618):

> ". . . since the contract violations were at the core of Worldwide's c. 93A claims, the

> contract's choice-of-law clause bars application of the Massachusetts statute."

The agreement between the Robbins petitioners and the respondents manifestly did not contain any such choice-of-law clause. Thus there is no contractual bar regarding the application of the Massachusetts statute. Furthermore, petitioners' Massachusetts Gen.Laws Ch. 93A claims are independent of their contract claims and address the tortious interference and fraudulent activities of the respondents. Therefore based on the district court's faulty analysis of Worldwide Commodities, the Robbins petitioners were deprived of their right to pursue their claims under the Massachusetts statute.

The courts below further deprived the Robbins petitioners of their right to pursue a claim under the Massachusetts Unfair Trade Practices Act through their erroneous alternative application of Massachusetts law.

The district court concluded that (a 42)

> "even if Massachusetts law applies, plaintiffs' claim fails because the core breach of contract claims did not occur 'primarily and substantially' within Massachusetts, as required under Mass. Ann. Laws ch. 93 A § 11. Not only did most of Bassett-Walker's allegedly bad acts occur in Virginia, including the 1989 termination meeting, but also Robbins' territory included other states."

Furthermore, the Circuit Court failed to applied a de novo review of the district court's determination as to whether the conduct involving the Robbins claim occurred "primarily and substantially" in Massachusetts, which is the test under

Massachusetts law. See Clinton Hospital Association v. The Corson Group, Inc., 907 F.2d 1260 (1st Cir. 1990).

As shown in the record, based upon the Robbins complaint (JA 1047), the affidavit of Mr. Robbins (JA 893), and his deposition testimony (JA 974), Massachusetts was the jurisdiction in which respondents committed unfair trade practices in violation of Massachusetts Gen.Laws. Ann. Ch. 93A, including respondents' conspiracy to limit the orders from Massachusetts accounts of the Robbins petitioners, as a result of their conspiracy with Target Stores thereby leaving Mr. Robbins unable to complete orders for his other accounts, and by charging the accounts of Mr. Robbins in Massachusetts inordinately high prices that were not charged to other accounts. (JA 912-924; 1052-1064) Furthermore, Massachusetts is also the state in which respondents fraudulently induced Mr. Robbins to expend substantial amounts of money under the illusory prospect of becoming a salaried employee. (JA 896; 901; 908-9; 930; 933-6; 1014-18, 1018-24)

The panel ignored the direct relationship between this tortious conduct and Massachusetts only by overlooking, and thus completely failing to apply, the factors outlined in both Clinton Hospital, 907 F.2d at 1264-66, and Bushkin v. Raytheon Co., 393 Mass. 622, 632 (1985). Even assuming arguendo that the deceptive conduct of the respondents originated outside of Massachusetts, that conduct was intended to interfere with, and did in fact affect Mr. Robbins' business in Massachusetts. See Charles River Data Systems, Inc. v. Oracle Complex Systems Corp., 788 F. Supp 54, 61 (D.Mass. 1991). The losses that Mr. Robbins sustained, and the breaches and delays that the Massachusetts customer accounts of Mr. Robbins suffered, occurred in Massachusetts. Worse still, such conduct was a direct result of the unfair and deceptive conduct of respondents and a third party, Target Stores. Clinton, 907 F.2d at 1266. Respondents therefore did not meet their burden

of proving that their unfair and deceptive acts and practices did not occur primarily and substantially in Massachusetts, and the overwhelming weight of the evidence indicates just the contrary. (JA 912-24; 955) Summary judgment for respondents on this issue therefore was required to be denied, and the misapplication of Massachusetts law deprived them of their rights to pursue action under this statute.

The misapplication of state laws by the Courts below also deprived petitioner Slayton Associates of its right to pursue a cause of action under the Illinois Deceptive Trade Practices Act and the Consumer Fraud and Deceptive Business Practices Act. Disputed issues of fact exist as to the violations under these Illinois statutes. (JA 1334-1340; 1424-1438; 1375-1402; 1653; 1662-1676)

The Illinois Consumer Fraud and Deceptive Business Practices Act prohibits price discrimination as a competitive weapon. As shown in the affidavits and testimony of Wendel Slayton (JA 1309; 1373) and Robert Dykstra (JA 1493; 1662) submitted by petitioner, respondents engaged in such violative conduct.

Disputed issues of fact exist as to the propriety of respondents' actions in conspiring with Target Stores with the intent of limiting the supply of goods for other stores and charging other stores higher prices, to the detriment of the other stores as well as consumers. Respondents' conspiracy with Target placed Target's competitors at a comparative disadvantage, causing consumers to bear the burden of the higher prices, as shown in the record. (JA 1665-1671; 1675-6; 1695-1701; 1704-5; 915; 1322; 1326-7; 1334; 1343; 1480-1507.)

As stated in Loughlin v. Evanston Hospital, 113 Ill.2d 374, 550 N.E.2d 986 (1990):

> ". . . to state a cause of action under the Consumer Fraud Act, it is sufficient to allege that the complained-of conduct was 'unfair.': the conduct need not be fraudulent or deceptive."

The incorrect analysis by the Courts below of the Virginia Conspiracy Law, Va. Code. Ann. deprived petitioners of their right to proceed on their claims under Section 18.2-499(A) of the Virginia Conspiracy Law.

Ignoring numerous allegations and evidence presented in the record, the Fourth Circuit's decision incorrectly stated that petitioners "neither alleged, nor offered evidence to support, the malice component required under the Virginia statute." (a 12-13)

Contrary to such statement, allegations of malice are contained in each of the three complaints of the petitioners named herein. (JA 1057; 1068; 1070-71; 1317-8; 1343; 1347-8; 622-3; 625)

The verified complaint in Derthick alleges that (JA 623):

> "50. Said violations constitute a willful and wanton breach of the contractual relationship between the parties resulting from the malicious acts of defendants and wrongfully appropriating for their own benefit plaintiffs' good will and following in the trade in the territory, and the commissions attributable to sales derived therefrom." (Emphasis added.)

The complaint for the Robbins petitioners alleges (JA 1070):

> "136. Intending and contriving to destroy and ruin the business of plaintiffs, and to appropriate to themselves the good will established by plaintiffs, defendants maliciously, willfully and unlawfully conspired to induce various customers to refuse to deal with plaintiffs and to deal directly with defendants."

In addition, the verified complaint in Slayton alleges the following acts of malice by respondents (JA 1432):

> "103. Intending and contriving to destroy and ruin the business of plaintiff, and to appropriate to themselves the good will developed by plaintiff, defendants maliciously, willfully and unlawfully conspired to induce and compel plaintiff's accounts to refuse to deal with plaintiff and to deal directly with defendants."

Additional evidence of malice was presented in the Affidavit of Robert G. Dykstra, formerly a salesperson with petitioner Richard T. Derthick until the termination of the sales representatives in 1989. Mr. Dykstra, who had personally worked with Mr. Derthick and had knowledge of what had happened, states in his affidavit (JA 1665-1666):

> "19. The Target Stores deal was a conspiracy by and between Bassett-Walker, V.F. Corporation and Target Stores the purpose and effect of which <u>was willfully and maliciously to injure the commissioned sales representatives</u> in their reputation, trade, business or profession by (a) depriving their regular accounts of the Bassett-Walker merchandise required by them for the purpose of fulfilling their sales and marketing plans in 1989, (b) providing an unfair

> advantage to Target Stores by making terms available to Target Stores that were not offered to other accounts, (c) deliberately cutting back and withholding merchandise that was known to be needed by other accounts in 1989 so that it could be allocated to Target Stores, providing Target Stores with an unfair competitive advantage on the limited supplies of Bassett-Walker fleecewear products available, (d) thereby reducing the commissions available to the sales representatives on merchandise that otherwise would have been sold to their regular accounts that had indicated a need for such orders as part of the planning process for 1989, (e) ruining the business of the sales representatives by terminating them, and (f) maliciously injuring the terminated sales representatives by falsely indicating to the accounts that the former sales representatives themselves responsible for the delivery delays, poor service and cut-backs on merchandise allocated to such accounts." (Emphasis added.)

Mr. Dykstra's affidavit described in detail the conspiracy involving Target Stores, an account that had belonged to petitioner Slayton Associates. (JA 1321; 1670-1673)

The Fourth Circuit's determination on the issue of malice also is contrary to the holding of the Virginia Supreme Court in Greenspan v. Osheroff, 232 Va. 388, 351 S.E.2d 28 (1986), that the determination of whether the acts of respondents satisfy the malice component of the Virginia conspiracy law is a factual issue to be determined by the jury. As stated in Greenspan, 232 Va. at 388, 351 S.E.2d at 28:

> "We hold, therefore, that when the fact-finder is satisfied from the evidence that the defendants' primary and overriding purpose is to injure his victim in his reputation, trade, business or profession, motivated by hatred, spite, or ill-will, the element of malice required by Code § 18.2-499 is established, notwithstanding any additional motives entertained by the defendant to benefit himself or persons other than the victim."

Evidence of respondents' malice was duly presented to the courts below. The affidavits and deposition testimony presented to the district court raised a genuine issue of fact of the malicious motivation of respondents in injuring petitioners' reputations and in interfering with their businesses by conspiring with Target Stores to injure petitioners and their accounts, causing them to lose millions of dollars in sales and commissions, aside from preventing them from meeting their commercial obligations to their long-standing accounts, requiring that the issue be determined by a jury,. (JA 912-915; 512-23; 557-560; 1328-31; 1366-1369; 1500-01)

Had the Fourth Circuit relied upon a de novo review of the record rather than the incorrect conclusions of the district court, the panel would have determined that malice against the petitioners involving the conspiracy between respondents and Target Stores is a disputed fact issue raised by petitioners' papers in opposition to the motion for summary judgment. The Fourth Circuit would also have determined that the conspiracy claim of petitioners is not barred under the intracorporate conspiracy doctrine under Fox v. Deese, 362 S.E.2d 699, 708 (Va. 1987) because the conspiracy involved the respondents and another entity, Target Stores, thereby satisfying the statutory requirements under Va.Code. Ann. § 18.2-499(A).

Therefore, the lower courts' improper determination of the non-applicability of state laws on the basis of disputed fact issues should not be allowed to prevent the petitioners from pursuing their claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

June 9, 1997

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DERTHICK ASSOCIATES, INCORPORATED;
RICHARD T. DERTHICK,
Plaintiffs-Appellants,

V. No. 95-2230

BASSETT-WALKER, INCORPORATED;
V F CORPORATION,
Defendants-Appellees.

STANLEY ROBBINS, STAN ROBBINS AND
ASSOCIATES, INCORPORATED,
Plaintiffs-Appellants,

V. No. 95-2231

BASSETT-WALKER, INCORPORATED;
V F CORPORATION,
Defendants-Appellees.

SLAYTON ASSOCIATES, INCORPORATED,
Plaintiff-Appellant,

V. No. 95-2232

BASSETT-WALKER, INCORPORATED;
V F CORPORATION,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-94-26-D, CA-94-27-D, CA-94-28-D)

Argued: May 6, 1996

Decided: February 12, 1997

Before RUSSELL and MICHAEL, Circuit Judges, and
PAYNE, United States District Judge for the
Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Arthur McKee Wisehart, WISEHART & KOCH, New York, New York, for Appellants. James Marion Powell, Brian Marc Freedman, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Greensboro, North Carolina, for Appellees. **ON BRIEF**: Stuart L. Craig, CARTER, BASS, BLAIR & KUSHNER, Danville, Virginia, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM

This appeal ensued the grant of summary judgment in favor of Bassett-Walker, Inc. and its parent, VF Corporation, on all claims presented by each plaintiff-appellant. Our review of the award of summary judgment is de novo. Higgins v. E. I. DuPont de Neumours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988). Having conducted that review and having found no error, we affirm on the reasoning given by the district court.

I.

This litigation arose out of actions taken by Bassett-Walker to reorganize and restructure its approach to the marketing of its fleecewear products so that the company could remain competitive in an industry which itself was undergoing substantial change. At the time of the reorganization, each individual and corporate plaintiff was an independent sales representative for Bassett-Walker. No plaintiff represented Bassett-Walker exclusively and none operated pursuant to a written agreement.

Richard Derthick became a commissioned sales representative for Bassett-Walker in 1968. Upon the advice of his accountant, Derthick formed Derthick & Associates, a Michigan corporation which, in 1981, was reincorporated in Ohio. From 1968 until 1989, when the relationship was terminated, Derthick, and then Derthick & Associates, served as Bassett-Walker's sales

representative in Michigan, Ohio and Pennsylvania. Stanley Robbins and his company, Stan Rob-bins & Associates, a Massachusetts corporation, served as commissioned sales representatives for Bassett-Walker from 1965 until the relationship was terminated in 1989. Slayton Associates, Inc. served as a Bassett-Walker commissioned representative in Illinois and elsewhere in the mid-west from 1967 until the relationship was terminated in 1989. All of the terminations resulted from Bassett-Walker's reorganization and restructuring.

Following the termination of their respective relationships, each plaintiff. using the same counsel, filed an action in the United States District Court for the Southern District of New York. The actions were transferred to the Western District of Virginia where they were consolidated for purposes of discovery and dispositive motions, but not for trial.

Derthick and his company asserted claims: (1) for breach of contract, contending that certain oral communications created a contract between plaintiffs and Bassett-Walker that was terminable only for cause; (2) for tortious interference with the relationships between plaintiffs and the customers they had served while acting as Bassett-Walker sales representatives;[1] and (3) conversion of commissions claimed to be owing plaintiffs by virtue of purchases made from Bassett-Walker by customers plaintiffs had served while acting as Bassett-Walker sales representatives. Derthick,

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[1] Count III contains language sounding of civil conspiracy, in reality, the count asserts only a claim for tortious interference with business relations.

individually, also asserted a claim under the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 621, et seq.

Robbins and his company filed virtually identical claims to those filed by Derthick and his company for breach of contract, tortious interference with business relations and conversion. Robbins and his company also filed a claim for wrongful termination under Massachusetts law and for violation of the Massachusetts unfair trade practices law. Robbins, individually, filed an ADEA claim identical to that filed by Derthick.

Slayton Associates filed claims, virtually identical to those filed by Derthick and Robbins, for breach of contract, tortious interference with business relations, and conversion. Slayton Associates also alleged violations of the Illinois Deceptive Trade Practice Act and the Illinois Consumers Fraud and Deceptive Business Practices Act.

II.

The district court first considered the ADEA claims advanced by Derthick and Robbins, individually. The threshold issue was whether the plaintiffs were employees under the ADEA which defines an employee as "an individual employed by any employer." 29 U.S.C. § 630(f).

The district court correctly examined that issue by applying the principles set forth in Nationwide Mut. Co. v. Darden, 503 U.S. 318 (1992), and Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983). Based on the essentially undisputed factual record, the district

court held that Derthick and Robbins were independent contractors, not employees.[1] For that reason, the court held that Derthick and Robbins were not entitled to bring a claim under the ADEA. An examination of the record confirms that the district court was correct in determining that Derthick and Robbins were independent contractors and that, therefore, they were not entitled to bring an ADEA claim.

The district court correctly described the contracts which allegedly were breached by Bassett-Walker as oral agreements by which plaintiffs were to solicit orders for Bassett-Walker in certain geographic areas in exchange for a commission which was a specified percentage of the sales price. Upon an undisputed record, the district court determined that the agreements between each plaintiff and Bassett-Walker were verbal. The district court applied Virginia law to resolve the breach of contract claims[2] and, thereupon, rightly held that the record did not support the plaintiffs' contentions that their agreements were terminable only for cause.[3]

---

[1] All three plaintiffs disputed the legal significance attached to the facts, but the facts necessary to the decision were not in dispute.

[2] By the time of summary judgment, it appeared to the district court that the parties agreed that Virginia law was applicable to the breach of contract claim. And, it appears to us that the district court was correct.

[3] Because there was a contract, albeit verbal, the district court correctly granted summary judgment on the plaintiffs' unjust enrichment claims.

Under Virginia law, a contract for services is terminable at will if the intended duration of the contract cannot be reasonably inferred from its terms. Miller v. SEVAMP, Inc., 362 S.E.2d 915. 916 (Va. 1987). And, if one party may terminate at will so may the other. Id. All three plaintiffs asserted that they could terminate the agreements at will. The plaintiffs had the burden of overcoming the terminable at will presumption. Progress Printing Co. v. Nichols, 421 S.E.2d 428, 429 (Va. 1992). There was no evidence that the contracts were for a specified duration. The district court held that vague comments by Bassett-Walker executives were insufficient to overcome the presumption. And, therefore, Bassett-Walker was entitled to terminate its agreements with plaintiffs at will. We find no error in that determination.[1]

---

[1] Alternatively, the district court held that, even if the oral contracts were not terminable at will, they ran afoul of Virginia's statute of frauds (citing Graham v. Central Fidelity Bk., 428 S.E.2d 916 (Va. 1993). and Windsor v. Aegis Service, Ltd., 691 F. Supp. 956 (E.D. Va. 1988), affd, 869 F.2d 796 (4th Cir. 1989). The district court was correct in reaching that conclusion for the reasons it gave. The plaintiffs assert, for the first time on appeal, that Bassett-Walker is equitably estopped from relying on the statute of frauds. Because that theory was not presented to the district court, we will not entertain it on appeal. This renders moot the motion filed by Bassett-Walker to strike parts of the appellants' brief respecting equitable estoppel and the related motion for sanctions.
Accordingly, both motions will be denied as moot.

Finally, the district court also properly rejected the plaintiffs' assertion that, in terminating the plaintiffs' contracts, Bassett-Walker breached a covenant of good faith and fair dealing. Virginia does not recognize an independent claim for breach of such a covenant. Alternatively, the district court fully considered and rightly rejected claims of that ilk under the law of Massachusetts and Illinois.

IV.

The district court also granted summary judgment on the plaintiffs' claims that Bassett-Walker tortiously interfered with customer accounts which the plaintiffs had solicited for Bassett-Walker. In so doing, the district court decided: (i) that the contracts with which Bassett-Walker allegedly had tortiously interfered were solicited, in the first instance, by the plaintiffs for Bassett-Walker; and (ii) that Bassett-Walker and its customers were the only parties to the contracts with which Bassett-Walker allegedly had interfered. Both findings were correct on the undisputed record relating to those questions. In essence, as the district court observed, the plaintiffs' claims reduced to the notion that Bassett-Walker had interfered with its own accounts. For the reasons it gave, the district court correctly granted summary judgment on the claims asserting tortious interference with business relationships.

In a related component of the same claims, the plaintiffs asserted interference with the same accounts by Bassett-Walker when, in subsequent transactions with its customers, Bassett-Walker granted allegedly

preferential pricing terms to some large customers without extending the same terms to Bassett-Walker customers which had been serviced by the plaintiffs. The district court correctly held such conduct not to have been actionable under the tort of interfering with business relations.

Finally, Derthick & Associates asserted that Bassett-Walker interfered with relations between Derthick & Associates and its employees by offering some of those employees jobs after Bassett-Walker terminated Derthick & Associates as a commissioned representative. Applying Virginia law, the district court correctly held that, because the relationships between Derthick & Associates and its own sales persons were terminable at will, there could be no recovery on this claim absent proof that Bassett-Walker had used improper means in hiring the Derthick & Associates' sales persons. Considering that Bassett-Walker had informed Derthick & Associates that it planned to expand its in-house sales force and had sought, and received, the permission of Derthick & Associates to talk to its sales persons about employment with Bassett-Walker, the district court correctly held that Bassett-Walker had used no improper means in hiring sales persons employed by Derthick & Associates.

V.

Each plaintiff raised a claim that Bassett-Walker had committed the tort of conversion by "taking accounts" which plaintiffs had solicited for Bassett-Walker. The essence of these claims is that the plaintiffs are entitled to commissions on post-termination sales which were made by Bassett-Walker's in-house sales staff to customers which formerly had been serviced by

plaintiffs on behalf of Bassett-Walker. We understand that the basis for granting summary judgment on the conversion claims was that the plaintiffs had no possessory interest in commissions on sales made after the termination of their relationship with Bassett-Walker, and we believe that the district court correctly decided that question. As the district court held, there could be no possessory interest in post-termination sales made by Bassett-Walker to customers formerly serviced by the plaintiffs unless the plaintiffs' termination was unlawful or unless there was a contract which conferred an interest in commissions on post-termmation sales. As the district court held, the termination was lawful.

It is true that Bassett-Walker notified the plaintiffs of termination on June 12, 1989 and allowed them to continue selling as representatives through December 1, 1989 and agreed to pay commissions on all orders shipped by May 31. 1990. However, there is no allegation that Bassett-Walker failed in any way to live up to that agreement.

Therefore, there is no possessory interest. Absent such an interest, conversion is not possible, as a matter of law.

VI.

The district court dismissed the Robbins plaintiffs' claims under the Massachusetts Unfair Trade Practices Act because it found that, under Massachusetts choice-of-law principles, Worldwide Commodities v. J. Amicone Co., Inc., 630 N.E.2d 615 (Mass. 1994), Virginia law controlled the relationship of the parties and that, therefore, the plaintiffs had no claim under

the Massachusetts statute. Alternatively, the district court held that, even if Massachusetts law were to apply, the allegedly offending conduct did not occur "primarily and substantially" in Massachusetts, which, under Gen. Laws Ann. ch. 93A, § 11, is a predicate to the successful assertion of a claim under the Massachusetts statute. We find no error in either conclusion.

VII.

The claim of Slayton Associates under the Illinois Sales Representations Act is, as the district court held, simply a recasting of its breach of contract claim. Finding that the plaintiff had received all of the commissions to which it was entitled, the district court granted summary judgment on the claim. We agree.

The claims of Slayton Associates under the Illinois Deceptive Trade Practices Act and the Consumer Fraud and Deceptive Business Practices Act also were properly dismissed for the reasons given by the district court. Indeed, the district court was charitable in not identifying those claims as frivolous.

VIII.

In their briefs before the district court, the plaintiffs argued that the conspiracy language which appeared in their tortious interference claims was sufficient to support a claim for a conspiracy to intentionally injure another in his trade, business or profession under Va. Code Ann. § 18.2-499(A). As the district court held, the plaintiffs did not properly plead, or offer evidence to support, a key element of a claim cognizable under the Virginia statute. Specifically, they neither

alleged, nor offered evidence to support, the malice component required under Virginia decisional law. Alternatively, applying the intracorporate conspiracy doctrine as recognized under Virginia law, Fox v. Deese, 362 S.E.2d 699 (Va. 1987), the district court held that the conspiracy claim failed as a matter of law. We find no error in the district court's determination on either issue.

CONCLUSION

Therefore, for the reasons given by the district court, the award of summary judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

RICHARD T. DERTHICK, and
DERTHICK ASSOCIATES, INC.

Plaintiffs, Civil Action No. 94-0026-D

V.

BASSETT-WALKER, INC., and
VF CORPORATION,

Defendants.

STANLEY ROBBINS, and
STAN ROBBINS & ASSOCIATES, INC.

Plaintiffs, Civil Action No. 94-0027-D

V.

BASSETT-WALKER, INC., and
VF CORPORATION,

Defendants.

SLAYTON ASSOCIATES, INC.,

Plaintiff, Civil Action No. 94-0028-D

V.

BASSETT-WALKER, INC., and ORDER
VF CORPORATION,

Defendants.

For the reasons expressed in the accompanying memorandum opinion, it is hereby ADJUDGED and ORDERED that defendants' motions for summary judgment in all three cases are GRANTED.

The clerk is directed to send a certified copy of this order and accompanying memorandum opinion to all counsel of record and to strike this case from the docket.

ENTERED this 18th day of May, 1995.

/s/ Jackson L. Kiser

Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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BASSETT-WALKER, INC., and
VF CORPORATION,

Defendants.

SLAYTON ASSOCIATES, INC.,

Plaintiff, Civil Action No. 94-0028-D

V.

BASSETT-WALKER, INC., and VF CORPORATION, MEMORANDUM OPINION

Defendants.

By: Jackson L. Kiser, Chief Judge
United States District Court

Plaintiffs have sued defendants Bassett-Walker and its parent VF Corporation for breach of contract and other claims arising from defendant Bassett-Walker's restructuring and elimination of commissioned sales representatives in 1989. Bassett-Walker is a manufacturer of fleece wear (such as

sweatshirts and jogging pants). Since the fall of 1984 it has been a wholly owned subsidiary of VF Corporation, based in Pennsylvania. Plaintiffs were commissioned sales representatives for Bassett-Walker until their termination. They claim that they were wrongfully terminated based on a contractual arrangement with Bassett-Walker that allegedly provided for termination only for cause. They also claim a right in continuing commissions generated from accounts they developed. In addition, individual plaintiffs in the first two cases claim that defendants violated the Age Discrimination in Employment Act, 29 U.S.C. 621-34, (ADEA) by terminating them. Jurisdiction is proper under that act and under 28 U.S.C. § 1332.

The cases were first filed in 1990 and 1991 in the Southern District of New York. After some delay, they were finally transferred to this Court in April 1994. They are connected cases and have been consolidated for the purposes of discovery and dispositive motions but not for trial. I too will consolidate them for the purposes of this opinion. The parties are now before me on the defendants' motions for summary judgment. The issues have been fully briefed and argued and are now ripe for disposition. For the reasons expressed below, I will grant defendants' motions.

I. Facts

A. Complaints

1. Derthick, filed August 20, 1990[1]

Richard Derthick, an Ohio resident (and his company

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[1] Papers and correspondence pertaining to all three case are filed in Derthick.

Derthick & Associates, Inc., also a plaintiff), was employed by Bassett-Walker as a commissioned sales representative for retail and wholesale accounts beginning in 1968. He alleges the following causes of action: (1) violation of the ADEA; (2) breach of contract; (3) tortious interference with customers and sales associates; and (4) conversion. Plaintiffs seek reinstatement and compensatory, liquidated and punitive damages as well as damages for pain and suffering, mental anguish and emotional distress.

2. Robbins, filed November 20, 1990

Stan Robbins, a Massachusetts resident (and his company Stan Robbins & Associates, a Massachusetts corporation), was employed as a commissioned salesperson in 1965 by Bassett-Walker. He was terminated as a commission salesman as of December 1, 1989, and was offered a position as a salaried salesman. He accepted the position and learned that he would have to relocate to New York City . He was not ultimately employed by Bassett-Walker. He alleges the following causes of action: (1) violation of the ADEA; (2) breach of contract; (3) tortious interference with business relations; (4) conversion; (5) wrongful termination; and (6) unfair trade practices in violation of Massachusetts law. Plaintiffs seek reinstatement, compensatory and punitive damages.

3. Slayton Associates, Inc., filed June 7, 1991

Plaintiff Slayton Associates, Inc. (and its predecessor Slayton & Associates) was employed by Bassett-Walker as a commissioned sales representative beginning in 1967. Plaintiff was terminated effective December 1, 1989. It states the following causes of action: (1) breach of contract; (2) tortious interference with business relations; (3) conversion; (4) violation of the Illinois Sales Representative Act; and (5)

violations of the Illinois Deceptive Trade Practice Act and the Illinois Consumer Fraud and Deceptive Business Practices Act. Plaintiff seeks compensatory and punitive damages.

B. Summary of Facts.

1. Background on Plaintiffs

In 1968, Derthick and an associate, Bob Dykstra (later an employee of Derthick & Associates), agreed to sell Bassett-Walker fleecewear in Michigan for a 2-1/2% commission. Certain Michigan accounts were excluded from his territory as "house" accounts. The parties agreed that Derthick could represent other manufacturers' lines. There was no written agreement. In addition, there was no discussion about the duration of the relationship. Derthick depo. at 67-78. According to Derthick, the parties did not discuss how Bassett-Walker could terminate the relationship, although Derthick understood that he was free to end it at any time. Id. at 80, 92. In 1970, Derthick incorporated Derthick & Associates in Michigan. In 1981, when Bassett-Walker expanded his territory to include Ohio, he reincorporated in Ohio. His territory was later expanded to include western Pennsylvania. Derthick's initial decision to incorporate was based on advice of his personal accountant to gain personal tax advantages. From its incorporation in 1970, Derthick & Associates has deducted and paid payroll taxes for its employees.

Stan Robbins became a salesman in 1957, working first for a sales representative. He met with James Montgomery, Bassett-Walker's Vice President of Sales, in Martinsville, Virginia (Robbins depo. at 17-18, 89). It was agreed that he would represent Bassett-Walker in the six New England states and receive a 2-1/2 % commission. Part of the agreement was that he could continue to represent other lines. There was no

written agreement. He understood that he would remain employed by Bassett-Walker as long as he performed satisfactorily. In 1977, Robbins incorporated Stan Robbins & Associates in Massachusetts based on advice from his attorney. He is and has always been the president and is treasurer. He is paid a monthly salary by Stan Robbins & Associates as is his wife who works as a bookkeeper.

Around 1953, Wendel Slayton, Jr., formed a partnership with his father and two others, primarily to sell textiles. The business grew and was incorporated in Illinois in 1970. In 1966, he and Jim Stanley, a partner, initiated negotiations with James Montgomery to allow Slayton Associates (t/k/a Slayton & Associates) to represent Bassett-Walker in the midwest. It was originally agreed that they would receive a 2% commission on all orders but Sears and Kresge (K Mart), on which the commission would be 1-1/2%. They agreed that Slayton Associates could continue to represent other manufacturers. Slayton depo. at 23-26. The parties did not discuss the duration of the relationship or how it could be terminated, though Slayton understood that there was no restriction on how Slayton Associates could terminate the relationship. Id. at 27-28. Slayton Associates' territory was expanded in the late 60s and early 70s (part of its territory was also reassigned to Derthick). It developed a Strategic Sales Plan for the years 1987-1992 outlining its efforts to help Bassett-Walker grow in the changing fleece market. Slayton depo. at 162-64; ex. 12. The plan detailed Slayton Associates' efforts to develop accounts, penetrate the sporting goods field, and open two branch offices (in Minneapolis and St. Louis). Bassett-Walker did not require the plan; instead Slayton Associates independently drafted it to demonstrate its commitment to Bassett-Walker. Slayton depo. at 147.

2. Bassett-Walker's Relationship with Derthick and Robbins

Bassett-Walker compensated plaintiffs solely on commission, first in checks made out personally to the individual plaintiffs and then to their business. Bassett-Walker reported this income on a 1099, not a W-2, and did not withhold taxes (it withheld other amounts due). Derthick & Associates maintained its own office space, provided its own supplies, employed its own secretaries, and employed and paid sales people, including Bob Dykstra, Sam Impastato, Michael Denome, John Turner, and Rick Derthick (plaintiff's son). It paid its individual sales people a percentage of their sales, and reported this on a 1099. It also maintained life insurance policies on its salesmen. Its salesmen were responsible for their own sales expenses.

Robbins first worked out of his house and then moved into commercial office space. Stan Robbins & Associates leased the space in its name, provided its own office equipment and paid its own operating expenses and telephone bills. Several salespeople worked as salaried employees over the years, with salaries reported on W-2 forms. They were not paid by Bassett-Walker. Robbins was solely responsible for hiring and firing his employees and did fire several for various reasons. Stan Robbins & Associates reimbursed its salesmen for travel expenses, maintained health insurance and a profit-sharing plan, and deducted and paid payroll taxes.

None of the salespeople or employees of the plaintiffs participated in Bassett-Walker's health insurance plan, dental plan, pension plan, disability plan, or any of the other benefit plans available to employees of Bassett-Walker. Derthick depo. at 140-45; Robbins depo. at 95-96. Bassett-Walker never provided workers' compensation insurance for Derthick, Robbins or any other employee of Derthick & Associates or Stan Robbins & Associates. Derthick depo. at 27. Derthick asserts that Bassett-Walker offered Derthick Associates a benefits package but it was declined. Dethick affid. ¶ 96. He

elsewhere contradicted this by testifying that he felt Bassett-Walker should have offered them its benefit plans and paid payroll taxes. Derthick depo. at 425. Bassett-Walker did not reimburse plaintiffs' expenses for sales calls, mileage or entertainment. It only reimbursed the plaintiffs for out-of-pocket expenses when one of their sales people attended sales or client meetings in Martinsville. In those cases, Bassett-Walker paid Derthick & Associates or Stan Robbins & Associates which in turn reimbursed the individual. Robbins depo. at 83-84.

Starting in 1985, Derthick & Associates purchased all sample products used to promote Bassett-Walker's products directly from Bassett-Walker. If Stan Robbins & Associates' customers did not pay for samples, 50% of the cost was charged against their commission. They were required to pay the markdown allowance to Hills Department Stores, that was negotiated between Hills, Bassett-Walker and Stan Robbins & Associates. In 1989, this came to $2000. Robbins depo. at 261-63.

Derthick kept his own schedule, determined his own hours, vacation time, and scheduled his own appointments with customers. Bassett-Walker required that he keep a weekly log of sales calls, but did not set a minimum or maximum. Derthick testified that starting in 1988, Bassett-Walker had to approve their vacation time (it issued a letter stating that no vacation would be scheduled until further notice). Derthick depo. at 279-80.

All orders written were subject to approval by Bassett-Walker, and the order form noted that orders could only be accepted by Bassett-Walker. Bassett-Walker set all prices and terms; plaintiffs could not alter them.

3. Sale of Other Manufacturers' Products

Derthick & Associates did not sell Bassett-Walker products exclusively. Derthick & Associates also represented several hosiery manufacturers, a towel manufacturer, and manufacturers of thermal underwear, rugs, jackets, slippers and scarves. Bassett-Walker knew of the other lines, and only requested that plaintiffs not represent competing lines of fleece.

Stan Robbins & Associates also represented other manufacturers (selling men's knit shirts and night sport shirts) with Bassett-Walker's knowledge. Robbins knew he was prohibited from selling for any other fleece manufacturer, Robbins depo. at 72-73, but in 1988 his company entered an agreement to sell competing fleecewear with Durham Mills. The sale was to Salem Screen Print Company, a potential Bassett-Walker customer, and Robbins never informed Bassett-Walker of it, and in fact was concerned about the ramifications if Bassett-Walker found out. Robbins depo. at 432-38.

Likewise, Slayton Associates did not sell Bassett-Walker products exclusively; it represented several other manufacturers at the same time, with Bassett-Walker's knowledge. Slayton depo. at 24, 40. In fact, it serviced some of the same accounts for Bassett-Walker and other manufacturers.

4. Bassett-Walker's Negotiation with Target

In 1988, Target Stores put its fleecewear business out to bid. Target had been originally part of Slayton Associates' territory and Slayton Associates received a 2% commission on orders. Bassett-Walker made an offer to Target that included a marketing plan, with advertising, volume prices, exclusive brand label, warehouse discounts, an exclusive customer service representative, and direct contact with top-level management at Bassett-Walker. Slayton depo. at 107-09, 178-97. Bassett-Walker officials met directly with Target officials; no

one from Slayton Associates was included. Id. at 110-12. Bassett-Walker's representative, Sonny Wade, did inform Slayton and Stanley that if negotiations were successful, their commission would be reduced to 2% on the initial $20 million and 1.5% on sales above $20 million. After Target awarded Bassett-Walker its business, Slayton Associates agreed to an even further cut to 1% on the first $30 million and 0.5% thereafter. Id. at 172-74. (The commissions were lowered because of additional concessions by Bassett-Walker. Id. at 177-78. Slayton concedes that these concessions were based on valid business decisions by Bassett-Walker. Id. at 200-03.)

5. The Restructuring

In the 1980s, the fleecewear industry was becoming increasingly dominated by a few major retailers who placed increasing demands on suppliers. They wanted to work directly with the manufacturer, and they wanted an independently recognizable brand name. Rowan depo. at 12, 50, 74. Competition increased and Bassett-Walker's market share declined dramatically. Rowan depo. at 87. To remain competitive, Bassett-Walker restructured its approach.

On June 12, 1989, plaintiffs attended a meeting in Martinsville in which each was told that Bassett-Walker was going to reorganize its sales force. It made a strategic business decision to change its marketing of fleecewear. It concentrated on a few major accounts (like Target and Hills) and drastically decreased its private label customers (large retailers who got their own label). It developed a brand name (Lee) and supported it with advertising and customer research. It abandoned entirely the sporting goods market, eliminated small retail customers, and slashed its customer base from approximately 1500 accounts to less that 600. It also elected to handle all sales in house, rely more on computers (Hills particularly wanted this) to compensate for a shorter lead time

in ordering and eliminated all commission-paid sales organizations. Plaintiffs were three of the fourteen independently owned and operated sales organizations notified that their relationship with Bassett-Walker would be terminated. The commissioned sales representatives were allowed to continue selling Bassett-Walker products through December 1, 1989, and Bassett-Walker agreed to pay commissions on all orders shipped by May 31, 1990. Derthick depo. at 365-66; Robbins depo. at 180; Slayton depo. at 90.

To supplement its in-house sales force, Bassett-Walker recruited and hired several individuals formerly associated with the independent sales organizations. After the June 12 meeting, Sonny Wade, Bassett-Walker's National Sales Manager told this to Derthick. Derthick said he would be interested in a position. Wade also asked for and received permission to talk to Sam Impastato. Derthick depo. at 240-42. The following former sales associates were hired: Stan Robbins (age 54), Roy Doyle (age 50), Chuck Goodell (age 48) (of Slayton Associates), Sam Impastato (age 44), Robert Dykstra (age 44), Pete Borges (age 43), Lori Eaton (age 31), Aprille Shaffer (age 31), and Jim Trotter (age 26). In addition Bassett-Walker approached Slayton (age 60) and Stanley (age 60) (both of Slayton Associates). They declined the offer but asked that Slayton's sons, Skip Slayton (age 37) and Tom Slayton (age 32), be offered the jobs, which they accepted. The decision about which individuals to hire was based on customer contacts and geographical location. Butler affid. ¶ 5-7. After Robbins accepted the job, a dispute arose about whether he would work from his home or whether Bassett-Walker would pay for rent of commercial space (Bassett-Walker never agreed to, Robbins depo. at 206), and whether he would relocate from Boston to New York. He declined to relocate and Bassett-Walker declined to pay for office space so Robbins ultimately turned down the job. Robbins depo. at 208-10, 217-18. Robbins' severance letter of February 27, 1990, stated that his status

reverted to that of a commissioned sales representative and that he would receive severance pay. Robbins affid. ¶ 117, Ex. K.

Although Derthick, Slayton, and Robbins no longer represent Bassett-Walker, they continue to represent other manufacturers, and service the same accounts they serviced for Bassett-Walker, on behalf of other manufacturers. Derthick depo. at 376-77; Robbins depo. at 429-30; Slayton depo. at 7-8, 302-03. Derthick acknowledges the validity of Bassett-Walker's restructuring and admits it was not done to harm him. Id. at 200.

Plaintiffs argue that they took Bassett-Walker from obscurity to dominance in fleecewear. Their territories accounted for 1/3 or $100 million of Bassett-Walker's $300 million in U.S. sales in 1989. Robbins affid. ¶ 11, 65-70, 204, 208. They were not terminated because of lack of sales. Dykstra affid. ¶ 16-17. Plaintiffs blame Bassett-Walker's own limitations for its problems competing in the market. Robbins affid. ¶ 43-47, 63-71, 77, 204-08; Derthick affid. ¶ 31-35, 59-63; Slayton affid. 32-36, 60-66. Indeed, in 1989, plaintiffs' accounts were severely cut back and restricted in the amounts they could order. Robbins affid. ¶ 11, 65-70, 204-08.

They further assert that before VF Corporation's 1984 acquisition of Bassett-Walker, it was run as a family with plaintiffs as members of that family. The custom was that representatives were terminated only for cause. They received assurances that the relationship was long term and in fact were with the company for over 20 years.

At the end of 1984, VF Corporation acquired Bassett-Walker. At that time, it went to great lengths, both orally and in writing, to assure the sales representatives that their relationship with Bassett-Walker would not change. (VF Corporation needed to maintain the level of sales.) Indeed, at

the 1988 sales meeting, Tom Butler assured the representatives that they were the best, and the current system did not need to be changed. Robbins affid. ¶ 20-22, 37-41; Derthick affid. ¶ 6-37, 34-138; Slayton affid. ¶ 2-58.

II. Standard for Summary Judgment

A moving party is entitled to summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979); Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir.), cert. denied, 115 S. Ct. 67 (1994).

In considering the parties' motions for summary judgment, I must view the facts and draw reasonable inferences in a light most favorable to the nonmoving party on a given issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The party seeking summary judgment bears the initial burden to show an absence of evidence to support the nonmoving party's position. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The nonmoving party must then demonstrate that a triable issue of fact exists. Anderson, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. Id.

III. Discussion

A. ADEA Claim

Both Derthick and Robbins lodge ADEA claims against defendants arguing that they were discriminated against based on their age. Their ADEA claims must fail because Derthick and Robbins (as well as Slayton Associates) are independent

contractors and not employees covered by the statute. Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983).

The ADEA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 631(f). In interpreting this definition in another statute, the Supreme Court has held that an individual's status would be determined by the common law test of agency. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992). The Court would consider the hiring party's means to control the manner and means by which the product is accomplished and, in addition, the following factors:

(1) the skill required;

(2) the source of the instrumentalities and tools;

(3) the location of the work;

(4) the duration of the relationship between the parties;

(5) whether the hiring party has the right to assign additional projects to the hired party;

(6) the extent of the hired party's discretion over when and how long to work;

(7) the method of payment;

(8) the hired party's role in hiring and paying assistants;

(9) whether the work is part of the regular business of the hiring party;

(10) whether the hiring party is in business;

(11) the provision of employee benefits; and

(12) the tax treatment of the hired party.

Id. (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 738, 751-52 (1989).

A close examination of the relationship between the parties, from the perspective of the plaintiffs, reveals that Bassett-Walker did not exercise the kind of control required to make the commissioned sales representatives employees. Derthick admits he set his own schedule and was free to schedule vacation without Bassett-Walker's approval (at least until 1988). He did not have to make a maximum or minimum number of sales calls, though he did have to track his appointments on a weekly call report. Bassett-Walker did not control the aspects of his presentation. Likewise, Robbins conducted his own business, and hired and fired his own employees. He even proffered an noncompete agreement to one salesman, Randy Bressler, and when he refused to execute it, fired him.

Examination of the other factors in Darden further support this conclusion. Derthick & Associates and Stan Robbins & Associates were incorporated entities which represented other manufacturers' lines, employed other sales representatives, and their own secretaries and bookkeepers (Mrs. Robbins). They rented their own office space, furnished their own supplies and paid their own daily expenses including stationery and telephone bills. Derthick & Associates had to purchase the Bassett-Walker samples it used in marketing, and Stan Robbins & Associates bore half of the cost of samples not paid for by its customers. For tax purposes, Bassett-Walker treated plaintiffs as independent contractors, reporting the commissions paid on a 1099. Bassett-Walker did not provide any benefits to plaintiffs. They bore the regular sales

expenses of servicing accounts. Bassett-Walker only reimbursed them for expenses incurred for sales meetings in Martinsville. Plaintiffs did not have authority to accept orders on behalf of Bassett-Walker, nor did they have discretion to alter the terms of the orders. Plaintiffs themselves emphasize the high degree of skill they brought to the job. See Derthick compl. ¶ 31, 35 ("building up business"; "pioneering work"); Robbins compl. ¶ 110. In Garrett, the Fourth Circuit ruled that a sales person was an independent contractor because he chose his own working and vacation hours; paid for his own operating costs; and was not prohibited from selling products for other companies. 721 F.2d at 982. He was also responsible for his own income and social security taxes and did not receive any benefits. Id.

Plaintiffs attempt to distinguish Garrett, by highlighting the following factors present in the instant case but not in Garrett: plaintiffs needed to inform Bassett-Walker of vacation days, needed Bassett-Walker approval to hire sales representatives, and never admitted that they were independent contractors. Defendant correctly points out that these elements of "control" were undertaken for business reasons. Bassett-Walker needed to know their whereabouts, even on vacation, in case it needed to reach them. This "control" over their schedules alone is not sufficient to make them employees. Carney v. Dexter Shoe Co., 701 F. Supp. 1093, 1100 D.N.J. 1988). Plaintiffs did not seek approval to hire and fire clerical staff. They only obtained approval when hiring new sales associates, and that was justified by Bassett-Walker's legitimate business interest in the individuals selling its products. Furthermore, it is clear that Robbins set the terms of the sales representatives' relationship with his company, even terminating several sales associates. That plaintiffs gave no written acknowledgement of their status as independent contractors is not dispositive. Daughtrey v. Honeywell, Inc., 3 F.3d 1488, 1492 (11th Cir. 1993).

ARA Leisure Servs. v. N.L.R.B., 782 F.2d 456 (4th Cir. 1986), relied on by plaintiffs, is distinguishable. There, the court determined that plaintiffs were employees based on defendant's close control over the individuals' daily lives. Defendant withheld payroll taxes, provided workers' compensation, required vendors to submit employment applications, designated work hours, and enforced workplace rules of conduct. Defendant secured licenses for vendors, procured their space, equipment, uniforms and a certain amount of cash to make change, all in sharp contrast to the present case.

Because I have held that Robbins does not fall within the protection of the statute, I need not consider defendants' further assertion that his claim was not timely, nor need I address defendants' assertion that Bassett-Walker's restructuring did not constitute age discrimination.

B. Breach of Contract

Defendants assert that Virginia law should govern the relationship between the parties, the breach of contract and other state law claims, because the initial contract between plaintiffs and defendant was made in Martinsville, all significant terms were set then, and the relationship was terminated in Virginia.[2] Performance centered in Virginia. Plaintiffs were

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[2] Van Dusen v. Barrack, 376 U.S. 612 (1964), mandates that the Court apply the transferor court's choice of law in a § 1404(a) forum non conveniens transfer. New York law controls because that court was sitting in diversity. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 498 (1941). Under New York law, the "center of gravity" or "grouping of contacts" test directs you to consider the most significant contacts in this dispute. In re Allstate Ins. Co., 613 N.E.2d 936 (N.Y. 1993).

in multiple states, but Bassett-Walker always performed its obligations in Virginia, including accepting orders, filling orders, and sending out commissions. Plaintiffs had regular contacts with Virginia, calling Bassett-Walker's offices and attending sales meetings. In their responsive brief, plaintiffs continue to advance their state law claims, but also assert a claim under Virginia's conspiracy statute and do not rebut defendant's arguments that Virginia law should govern. Because they tacitly concede that Virginia law is appropriate, I will apply Virginia law.

The contract at issue here consisted of an oral agreement between the plaintiffs and Bassett-Walker to solicit orders for Bassett-Walker in certain geographic areas in exchange for a certain percentage of the sales as a commission. Plaintiffs claim that Bassett-Walker's unilateral decision to terminate them in June 1989 breached that contract.

In Virginia, a contract for services is terminable at will if the intended duration of the contract cannot be reasonably inferred from its terms. Miller v. SEVAMP, Inc., 362 S.E.2d 915, 918 (Va. 1987). If one party is free to terminate the relationship at will, then so is the other party. Id. at 917. The burden is on the party claiming a definite duration to rebut this presumption. Progress Printing Co. v. Nichols, 421 S.E.2d 428, 429 (Va. 1992).

Derthick, Robbins, and Slayton all claim that they could terminate the relationship at any time for any reason, but that Bassett-Walker could only terminate it for cause. This

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These contacts include the place of contracting, negotiation and performance, the location of the subject matter of the contract, and the domicile of the contracting parties.

alone creates employment at will according to Miller. Plaintiffs attempt to rebut the at-will presumption by highlighting Bassett-Walker's alleged custom, but can cite only one instance in support of a "for cause" termination--a comment by a Bassett-Walker executive that the only time Bassett-Walker ever terminated an employee was for good cause. Derthick depo. at 87-88; Robbins depo. at 326-31. This is insufficient under Title Ins. Co. v. Howell, 164 S.E. 387, 389 (Va. 1932) ("one swallow does not make a summer). Robbins also referred to a comment by Tom Butler that he (Robbins) "[didn't] have to worry." No plaintiff could identify any agreed upon provisions regarding termination, such as lifetime tenure, citing only the 1984 and 1988 statements that no changes would be made in the sales force. Derthick depo. at 91-93; Robbins depo. at 326-31; Slayton depo. at 146-49. Under Virginia law, vague comments cannot rebut the presumption that the contracts were terminable at will. See Addison v. Amalgamated Clothing & Textile Workers Union, 372 S.E.2d 403, 405 (Va. 1988) (employment was terminable at will even though employer gave assurances that employee had the job as long as he wanted it); Miller, 362 S.E.2d at 916; Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101, 109 (2d Cir. 1985) (distinguishing between casual comments or mere pep talks delivered by management to a group of employees, which could not create a presumption that a contract was for a definite period, and one-on-one negotiations with a star employee). Nor did Slayton Associates' Strategic Business Plan modify the contract to create a term lasting the duration of the plan (until 1992). That plan was unilaterally produced by Slayton Associates; it was not requested or endorsed by Bassett-Walker. It did not contain language that the relationship would last until 1992. Second, custom is used to clarify terms not to add terms to a contract. See Chas. H. Tompkins Co. v. Lumbermens Mut. Cas. Co., 732 F. Supp. 1368, 1375-76 (E.D. Va. 1990). Finally, parties to an agency contract, such as plaintiffs (as independent contractors), are usually businesses who could have contracted for such a

"just cause" term. See Plaskitt v. Black Diamond Trailer Co., 164 S.E.2d 645 (Va. 1968).

Plaintiffs' reliance on Barger v. General Electric Co., 599 F. Supp. 1154, 1161 (W.D. Va. 1984), is misplaced. It dealt with employee handbooks, was based on an employment relationship, and a writing (the handbook) existed. Here, there is no writing, only nonspecific, vague and ambiguous statements made in a variety of contexts over the course of 20 years.

This case is similar to Plaskitt v. Black Diamond Trailer Co., 164 S.E.2d 645 (Va. 1968). In Plaskitt, plaintiffs were exclusive sales representatives selling defendant's trailers in the Virginia area in exchange for a 2% commission. Two years after they had entered into the agreement, defendant notified plaintiffs that they were terminated, giving them 3 months notice. The court found that the parties had entered into a contract for an indefinite and indeterminable period and therefore the contract was terminable at will by either party. There as here the plaintiffs attempted to rebut the at-will presumption by pointing to additional consideration--the salesmen paid additional expenses. The court found those expenses incidental to their performing the personal service of selling, which they had contracted to provide. Id. at 648-49.

Plaintiffs' argument that they provided additional consideration sufficient to support imposition of a just cause termination provision must similarly fail under the reasoning in Plaskitt (distinguishing between a personal services contract and a franchise or distributorship). They fail to introduce any evidence that Bassett-Walker requested plaintiffs to forego specific job opportunities to represent other manufacturers. To the contrary, they represented other manufacturers with Bassett-Walker's knowledge. There is no evidence that they turned down other manufacturers. What additional

consideration they supplied was in the form of incidental expenses--incurred during the ordinary course of selling Bassett-Walker's and other manufacturers' products. See Plaskitt, 164 S.E.2d at 648. Of course, if I found such additional consideration, that would only impose a duty on defendants to give reasonable notice before termination to allow plaintiffs to recoup their investment. Jack's Cookie Co. v. Brooks, 227 F.2d 935, 938-39 (4th Cir. 1955), cert. denied, 351 U.S. 908 (1956); Plaskitt, 164 S.E.2d at 649-50. It is undisputed that Bassett-Walker gave 6 months notice and paid commissions on shipments made through May 1990.

Even if plaintiffs could establish that the contract was of a definite duration, it would violate Virginia's statute of frauds.[3] Under Graham v. Central Fidelity Bank, 428 S.E.2d 916, 917 (Va. 1993), the statute of frauds applies to an employment contract terminable for cause. In Windsor v. Aegis Serv., Ltd., 691 F. Supp. 956, 958 (E.D. Va. 1988), aff'd, 869 F.2d 796 (4th Cir. 1989), the court held that an oral contract terminable for just cause was unenforceable under the statute of frauds, and distinguished Frazier v. Colonial Williamsburg Foundation, 574 F. Supp. 318, 320 (E.D. Va. 1983), upon which plaintiff relies. Likewise, in Falls v. Virginia State Bar, 397 S.E.2d 671, 672-73 (Va. 1990), the Virginia Supreme Court would not enforce such an oral contract unless a written memorandum included the essential terms, and specifically that the contract was terminable for cause, and was signed by the party against which enforcement is sought. Derthick can only point to commission statements, sales catalogues and price lists. Robbins identified catalogues and order forms. Slayton referred

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[3] This is a procedural statute applied in diversity cases, Stein v. Pulaski Furniture Corp., 217 F. Supp. 587 (W.D. Va. 1963)).

to his relationship as the "handshake contract" and identified only letters between himself and Montgomery. Slayton depo. ex. 1-4. These are insufficient to satisfy the statute of frauds because they fail to state that the contract was terminable only for cause. Plaintiffs rely on earlier cases which were modified by these cases.

Because the contractual relationship was terminable at will, Robbins' wrongful termination claim must also fail. Under Virginia law, to maintain a suit for wrongful termination of employment at will, the termination must be against public policy, which includes personal freedoms. Lockhart v. Commonwealth Educe. Sys. Corp., 439 S.E.2d 328, 331 (Va. 1994). Courts have found such an exception only where the termination otherwise violated rights recognized by the legislature and embodied in state statutes. Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (1985), but not private rights or interests. Miller, 362 S.E.2d at 918. Plaintiffs have not identified any public interests, only private ones (business interest and good will). Second, plaintiffs are independent contractors, not employees; thus, the courts' narrow exception to the employment at will doctrine is not available in any event.

Robbins also argues that Bassett-Walker violated a covenant of good faith and fair dealing, but Virginia does not recognize an independent claim for breach of this implied covenant. L&E Corp. v. Days Inns of Am., Inc., 992 F.2d 55, 59 (4th Cir. 1993); Sneed v. American Bank Stationary Co., 764 F. Supp. 65, 67 (W.D. Va. 1991). Even under Massachusetts law, which does recognize such a claim, Robbins' claim must fail. The courts have recognized that the implied covenant is not breached if a legitimate business reason exists for the termination, recognizing that an employer needs wide latitude and flexibility in a changing business world. Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977). Plaintiffs have failed to rebut Bassett-Walker's

business justifications, suggesting only that in retrospect the restructuring was a poor business decision. The courts have failed to find a breach of the covenant of good faith and fair dealing when the claim has been based on loss of commissions on sales that have not yet been made (i.e., commissions not yet earned), King v. Mannesmann Tally Corp., 847 F.2d 907, 908 (1st Cir. 1988), nor is the discharge of an at-will employee without cause alone a violation of this covenant. Gram v. Liberty Mutual Ins. Co., 429 N.E.2d 21, 28 (Mass. 1981).

As a matter of law, the contract between the parties was terminable at will by either side, Bassett-Walker's 1989 termination cannot form the basis for a breach of contract claim.[4]

C. Tortious Interference with Contract

All three complaints allege interference with customer accounts, arguing: (1) Bassett-Walker began to deal directly with certain accounts; (2) Bassett-Walker allocated their goods to other accounts on a preferential basis; and (3) Bassett-Walker terminated their relationship with the accounts (Derthick and Robbins only). The Supreme Court set out the elements of this tort in Chaves v. Johnson, 335 S.E.2d 97 (Va.

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[4] Note, if Illinois law applies to Slayton Associates' breach of contract claim, defendants should still prevail because plaintiff can show no more than a contract terminable at will. Plaintiff admits that the contract was terminable for inadequate performance. Slayton compl. ¶ 21. Under Illinois law, a contract terminable for poor performance is an at-will contract. Gordon v. Matthew Bender & Co., 562 F. Supp. 1286 (N.D. Ill. 1983); other cases.

1985): (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the intervenor; (3) intentional interference inducing or causing a breach or termination in the relationship or expectancy; and (4) resultant damage. Justification or privilege is an affirmative defense. Specific grounds for the defense include: legitimate business competition, financial interest, directing business policy, and giving requested advice. 335 S.E.2d at 103.

1. Interference with Accounts

Essentially, plaintiffs are accusing Bassett-Walker of interfering with its own accounts, which cannot support their claims. The core contractual relationships are the sales contracts plaintiffs solicited for Bassett-Walker. The resulting contracts were between Bassett-Walker and its customer; plaintiffs were not parties thereto. The Fourth Circuit set a high standard for making out a claim of tortious interference against a financially interested party in Zoby v. American Fidelity Co., 242 F.2d 76, 79-80 (4th Cir. 1957) (contractor claimed surety, who had taken responsibility for bidding out Navy contract, interfered when it refused his bid). Where a party is financially interested and such interest motivates his conduct, then he is not an intermeddler. In Zoby, because defendant was a party to the transaction, it was acting in its own interest and not seeking to gain unfair advantage over a third party. Id. at 80. This Court, in Johnson v. McKee Baking Co., 398 F. Supp. 201 (W.D. Va. 1975), aff'd, 532 F.2d 750 (4th Cir. 1976), rejected such claims as falling within the scope of the economic interest privilege recognized by Zoby. (Plaintiffs accused defendants of dealing directly with accounts and also trying to learn the identity of plaintiffs' customers and gain proprietary information.)

In Frishberg v. Esprit de Corp., 778 F. Supp. 793,

803-04 (S.D.N.Y. 1991), aff'd, 969 F.2d 1042 (2d Cir. 1992), the court granted summary judgment dismissing a similar claim because it found that business relationships were not independent of Esprit, the relationship between plaintiffs and Esprit was at will, and plaintiffs had no independent right to sell Esprit merchandise.[5] Likewise, in McEntee v. Van Cleef & Arpels, Inc., 561 N.Y.S.2d 25, 26 (1st Dep't 1990), the court found that customers belonged to the company, and the former salesman had no independent interest in those customers upon which he could base an action for tortious interference. Indeed, Bassett-Walker always retained the right to choose when and to whom to ship its products, how much to ship, and whether to accept or reject orders.

Furthermore, even Derthick admits that Bassett-Walker's restructuring was legitimate. Butler's affidavit and Rowan's deposition testimony regarding Bassett-Walker's strategic business decision to restructure to adjust to the changing fleece market are unrebutted. Dykstra's affidavit, filed in support of plaintiffs case, does not create a triable issue. Based on his one year as a salaried sales employee, he alleges that the restructuring did not improve the servicing of accounts. Even if true, Dykstra offers no evidence to dispute that Bassett-Walker made the changes for legitimate reasons even if the changes were unsuccessful.

Moreover, the incidental effects, e.g., loss of commissions, flowing from a legitimate business decision, cannot constitute intentional interference. Nationwide Mut. Fire Ins. Co. v. Jones, 577 F. Supp. 968 (W.D. Va. 1984); see also

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[5] Plaintiffs rely on Bergstein v. Jordache, 767 F. Supp. 535, 543-44 (S.D.N.Y 1991), but that case predated Frishberg and was decided on a motion to dismiss.

Mitchell Mach., Inc. v. Ford New Holland, Inc., 918 F.2d 1366, 1371 (8th Cir. 1990); Robert J. McRell Assocs. v. Insurance Co. of N. Am., 677 F. Supp. 721, 729-30 (S.D.N.Y. 1987).

Finally, Bassett-Walker's acts did not actually terminate any of plaintiffs' relationships with the accounts. Its actions merely prevented plaintiffs from selling its merchandise. Derthick, Robbins and Slayton all admit that they continued to sell other manufacturers' merchandise to these same accounts. Derthick depo. at 376-77; Robbins depo. at 429-30; Slayton depo. at 303-04.

2. Preferential Allocations

Plaintiffs also claim that Bassett-Walker interfered with their accounts by allocating merchandise to specific accounts on a preferential basis. Derthick and Slayton point specifically to the preferential treatment Target Stores got that other accounts did not. Derthick depo. at 234-38; Slayton depo. at 325-27. (Robbins admits that two of his accounts also got preferential treatment (Hills and T-Shirt Station). Robbins depo. at 356-62). The Frishberg court rejected such a claim because the business relationships with which Esprit interfered belonged to it not plaintiff. 778 F. Supp. at 804. Likewise, Bassett-Walker was only interfering with business relations that belonged to it.

3 . Interference with Sales People

Derthick & Associates claims that Bassett-Walker interfered with its salespeople, based on Bassett-Walker's hiring of Dykstra and Impastato, but their relationships with Derthick & Associates were at will and terminable at any time for any reason. Derthick depo. at 152-55. Thus, when they accepted employment with Bassett-Walker, they did not breach any contract with Derthick & Associates. Derthick depo. at 239.

Because the relationship between the salespeople and Derthick & Associates was terminable at will, plaintiffs must also show that Bassett-Walker used improper means (violation of law, violence, threats, fraud, misrepresentation, deceit, duress, etc.). Peace v. Conway, 435 S.E.2d 133, 135 (Va. 1993). In the instant case, Bassett-Walker informed Derthick that it planned to expand its in-house sales force and also talk to his associates. Derthick gave Bassett-Walker permission to talk to Impastato, and asked to be considered for a position. Derthick depo. at 239-42. Absent improper means, Bassett-Walker's hiring away of two associates did not constitute improper interference. See Hechler Chevrolet, Inc. v. General Motors Corp., 337 S.E.2d 744, 748 (Va. 1985).

D. Conversion

The tort of conversion is defined in Universal C.I.T. Credit Corp. v. Kaplan, 92 S.E.2d 359, 365 (Va. 1956), as the wrongful exercise of authority or act of dominion over another's goods depriving him of their possession or the right to their possession. Courts have dismissed conversion claims based on future commissions on several grounds. In Unlimited Screw Prods., Inc. v. Malm, 781 F. Supp. 1121, 1131 (E.D. Va. 1991), the court held that the future contracts could not legally support the claim and denied a terminated salesman's claim. Other courts have found that a sales representative whose relationship is at-will does not have any cognizable interest in commissions after the relationship has been terminated. Wood v. Hutchinson Coal Co., 176 F.2d 682 (4th Cir. 1949); see also Frishberg, 778 F. Supp. at 793.

In Wood v. Hutchinson, the Fourth Circuit denied plaintiff's claim that he was entitled to continued commissions from a customer he obtained for defendant. As a sales agent for defendant, he had obtained an account and earned commissions off that initial sale, but before he could renew the

sales contract, defendant independently renewed the contract and terminated its relationship with plaintiff. The Fourth Circuit affirmed the lower court's grant of summary judgment, holding that the fact that plaintiff had negotiated the initial contract does not give him a right to commissions on a renewal he does not secure, in the absence of a contract to that effect. 176 F.2d at 684.

In Mackie v. LaSalle Indus., Inc., 460 N.Y.S.2d 313 (1st Dep't 1983), the court granted summary judgment on a salesperson's claim of conversion of future commissions on an account she had personally acquired. She had acquired a lucrative account and after some time, defendant took her account away (allegedly because the account was dissatisfied) and terminated her. The court defined her relationship as at-will and held that she was not entitled to commissions after the termination of her relationship with the defendant. 460 N.Y.S.2d at 315.

E. Robbins' Massachussets Law Claims (Unfair Trade Practices)

Plaintiffs claim Bassett-Walker violated Chapter 93A of the General Laws of Massachusetts. First, Virginia law applies precluding a claim under Massachusetts law. See Worldwide Commodities v. J. Amicone Co., 630 N.E.2d 615 (1994) (barring claim under same law because New York law governed). Second, even if Massachusetts law applies, plaintiffs' claim fails because the core breach of contract claims did not occur "primarily and substantially" within Massachusetts, as required under Mass. Ann. Laws ch. 93A § 11. Not only did most of Bassett-Walker's allegedly bad acts occur in Virginia, including the 1989 termination meeting, but also Robbins' territory included other states.

F. Slayton Associates' Illinois Law Claims

Slayton Associates claims that defendants violated the Illinois Sales Representative Act, 820 ILCS 120/2,which requires timely payment of commissions due on or after termination. Plaintiff has merely recast its breach of contract claim. In Hammond Group v. Spalding & Evenflo Cos., 1993 U.S. Dist. LEXIS 3756, at *17-18 (N.D. Ill. 1993), the court granted summary judgment on claims under this law because plaintiff was seeking future commissions and admitted it received all commissions rightfully due it before it was terminated, and plaintiff could not show it was entitled to commissions after it was terminated. Likewise here, plaintiff was paid all commissions to which it was entitled, including commissions for sales to Target Stores. Plaintiff had specifically agreed to the reduced commissions. There was no agreement that plaintiff would received commissions on Target sales indefinitely. Plaintiff is not entitled to commissions on sales it did not make (it is claiming commissions for sales by Bassett-Walker's salaried salespeople in plaintiffs old territory). There was no agreement for continuing commissions for an indefinite period. There was only an agreement regarding orders shipped before May 31, 1990. There also was no such custom or practice at Bassett-Walker to pay continuing commissions to former sales representatives, nor could Slayton identify any former representatives receiving continued commissions. Slayton depo. at 304-05. Plaintiffs Strategic Plan cannot support a claim to commissions through 1992 because it was produced unilaterally and was not endorsed by Bassett-Walker.

Slayton Associates cites Bassett-Walker's production and distribution problems, and its direct sale to accounts, bypassing commissioned sales representatives, as unfair trade practices, in violation of the Illinois Deceptive Trade Practice Act, 815 ILCS § 510/1. That act targets two deceptive practices: misleading trade identification and deceptive advertising. See Barliant v. Follett Corp., 483 N.E.2d 1312,

1317 (Ill. App. 1st Dist. 1985) (holding no violation of the act because there was no breach of contract). Plaintiff makes no allegation that Bassett-Walker mislabeled or misadvertised its products to deceive or confuse the public. Plaintiff only alleges that plaintiff was deceived. Plaintiff claims injury to the public because of reduced competition but has no evidence for this and this does not state a claim under the above statute.

Plaintiffs claim under the Illinois Consumer Fraud and Deceptive Business Practices Act (CFDBPA) also fails. This statute prohibits unfair or deceptive methods of competition in conducting any trade or business. 815 ILCS § 505/2. In Quality Alliance v. Atmosphere Processing, 1994 U.S. Dist. LEXIS 142, at *3-5 (N.D. Ill. 1994), the court rejected a claim by a sales associate claiming a manufacturer made misrepresentations and then terminated the representative. The court held that the manufacturer was the purchaser of the representative's services. Likewise, here Bassett-Walker was the consumer.

G. Unjust Enrichment

Plaintiffs essentially argue that Bassett-Walker fleeced the commissioned sales representatives and was unjustly enriched, under Nossen v. Hoy, 750 F. Supp. 740 (E.D. Va. 1990). As I understand plaintiffs' position, they are not claiming that no contract existed but that, based on their relationship with Bassett-Walker and their years of service, they should be entitled to commissions beyond the terms of their contract as I have defined it above. The equitable doctrine of unjust enrichment--implying a contract where none existed--is neither necessary nor appropriate, however, because a contract exists between the parties and plaintiffs do not dispute that they received the compensation due them under that contract.

H. Conspiracy Under Virginia Law

As mentioned above, defendants acknowledge (and in fact urge) that Virginia law applies. Plaintiffs in their brief, therefore, incorporate a claim for violation of the Virginia conspiracy statute, Va. Code § 18.2-499(a). Even assuming that the claims are timely, the conspiracy between Bassett-Walker and its parent, VF Corporation, must fail under the intracorporate conspiracy doctrine. Fox v. Deese, 362 S.E. 2d 699 (Va. 1987). The Southern District of New York previously held that the two defendants operated essentially as the same entity, see Mem. Op. of Judge Cannella, Sept. 23, 1992, a position plaintiffs urge in arguing that VF Corporation should be held liable. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at 61-65. Defendants' alleged conspiracy with Target Stores is not viable because I have already found, and plaintiffs have not rebutted, that Bassett-Walker acted for legitimate business reasons. Plaintiffs cannot, therefore, show a willful and malicious purpose behind Bassett-Walker's deal with Target, as required under the statute.

As to all of the claims, plaintiffs cannot surmount the legal and factual threshold necessary to survive summary judgment. Their affidavits are little more than legal conclusions and do not create disputed issues of fact.

An appropriate order shall issue.

/s/ Jackson L. Kiser
Chief United States District Judge

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK

BY: /s/ B. Wilson

DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 12, 1997

No. 95-2230
CA-94-26-D

DERTHICK ASSOCIATES, INCORPORATED;RICHARD T. DERTHICK

Plaintiffs - Appellants

V.

BASSETT WALKER INCORPORATED; V F CORPORATION

Defendants - Appellees

No. 95-2231
CA-94-27-D

STANLEY ROBBINS; STAN ROBBINS AND ASSOCIATES, INCORPORATED

Plaintiffs - Appellants

V.

BASSETT WALKER INCORPORATED; V F CORPORATION

Defendants - Appellees

No. 95-2232
CA-94-28-D

SLAYTON ASSOCIATES, INCORPORATED

Plaintiff - Appellant

V.

BASSETT WALKER INCORPORATED; V F CORPORATION

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
March 20, 1997

No. 95-2230
CA-94-26-D

Derthick Associates v. Bassett Walker Inc

No. 95-2231
CA-94-27-D

Stan Robbins v. Bassett Walker Inc

No. 95-2232
CA-94-28-D

Slayton Associates v. Bassett Walker Inc

MANDATE

The judgment of this Court dated 2/12/97 takes effect today.

PATRICIA S. CONNOR
CLERK

STATUTES INVOLVED

Age Discrimination in Employment Act, 29 U.S.C. § 630(f), in pertinent part:

> "The term 'employee' means an individual employed by any employer . . . "

Section 11 of Chapter 93A Massachusetts General Laws provides in pertinent part as follows:

> "§ 11. Persons engaged in business; actions for unfair trade practices; class actions; damages; injunction; cost
>
> "Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper."

The Consumer Fraud and Deceptive Business Practices Act provides in pertinent part as follows (815 ILCS 505/2 (1995):

> "Sec. 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 [815 ILCS 510/2], in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damages thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act."

The Section 2 of the Illinois Uniform Deceptive Trade Practices Act provides as follows [815 ILCS 510/2]:

> "312. Acts constituting deceptive trade practice
>
> "§ 2. A person engages in a deceptive trade practice when, in the course of his business, vocation or occupation, he:
>
> "(1) passes off goods or services as those of

another;

"(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

"(3) causes likelihood of confusion or misunderstanding as to affiliation, connection or association with or certification by another;

"(4) uses deceptive representations or designations of geographic origin in connection with goods or services;

"(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

"(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

"(7) represents that goods or services are a particular standard, quality or grade or that goods are a particular style or model, if they are of another;

"(8) disparages the goods, services or business of another by false or misleading representation of fact;

"(9) advertises goods or services with intent not to sell them as advertises;

"(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

"(11) make false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;

"(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

"In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

"This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State."

The Virginia Conspiracy Statute, Va. Code. Ann. § 18.2-499(A) provides as follows:

"Conspiracy to Injure Another in Trade, Business or Profession.

"§ 18.2-499. Combinations to injure others in their reputation, trade, business or profession; rights of employees. - A. Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and

maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class I misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

Excerpts of deposition testimony of Robert G. Dykstra, dated May 6, 1992, Exhibit A to the Affidavit of Robert G. Dykstra sworn to February 27, 1995, that was submitted to the District Court (JA1721-1729):

> "Q. Based on your experience with Bassett-Walker, do you feel that you were an employee of Bassett-Walker before the restructuring just as much as you after the restructuring?
>
> "A. Yes.
>
> "MR. FREEDMAN: Objection.
>
> "Q. Now, in terms of the economic realities of the situation, were you an employee of Bassett-Walker based upon your experience in the industry before the restructuring?
>
> "MR. FREEDMAN: Objection.
>
> "A. Yes.
>
> "Q. In that connection, did Bassett-Walker exercise the right to control the manner in which you performed your services?
>
> "MR. FREEDMAN: Objection.
>
> "A. Yes. We had reports we had to fill out for Bassett-Walker.
>
> "Q. And they were submitted directly to Bassett-Walker?
>
> "A. And they were submitted to Bassett-

Walker.

"MR. FREEDMAN: Objection.

"Q. Did Bassett-Walker establish the territories?

"A. Yes, they did.

"Q. And who set the prices at which the merchandise could be sold?

"A. Bassett-Walker

"Q. And did Bassett-Walker reserve the right to accept or reject offers? Sales, I mean?

"A. Yes.

"Q. In other words, the orders were sent in to Bassett-Walker, right?

"A. Yes, and they were accepted or not accepted, correct.

"Q. That wasn't done by Derthick & Associates?

"A. No.

"Q. And did Bassett-Walker exercise the right to decide what retailers to solicit?

"MR. FREEDMAN: Objection.

"Q. Do you know if Bassett-Walker reserved

the right to decide what retailers to solicit?

"A. Yes.

"Q. And did they?

"A. Yes, they did.

"MR. FREEDMAN: Objection.

"Q. And do you know if the orders that were shipped from Bassett-Walker were filled from Bassett-Walker? It wasn't merchandise that Derthick Associates bought and re-sold, was it?

"A. No, merchandise was s[h]ipped directly from Bassett-Walker, correct.

"Q. And did Bassett-Walker provide order forms, stationery, and office things of that sort with its name on for you to use?

"MR. FREEDMAN: Objection.

"Q. I had, in my office, many forms that Bassett-Walker developed, and we used them on a daily basis, including order forms, inquiry forms, memo forms, those types of things, envelopes, stationery.

"MR. FREEDMAN: Objection.

"A. Yes.

"Q. Were those catalogs in the name of Bassett-Walker?

"A. Yes.

"Q. And did the office of -- and under what name was the office of Derthick Associates maintained?

"MR. FREEDMAN: Objection.

"Q. Do you know under what name it was maintained?

"A. It was maintained under the name Derthick & Associates on some of the catalogs and, in some instances, we were listed as Bassett-Walker's regional office in Columbus, Ohio, with my office listed separately, my phone number, my fax number listed separately, and our other associates the same.

"Q. And when you went in to the office, did the Bassett-Walker logo appear, do you know?

"MR. FREEDMAN: Objection.

"A. Yes, absolutely, samples, logo.

"Q. Did Bassett-Walker give programs to train sales representatives at these sales meetings?

"MR. FREEDMAN: Objection.

"A. Yes.

"Q. Did Bassett-Walker evaluate the individual sales representatives at the sales

meetings?

"MR. FREEDMAN: Objection.

"A. Yes.

"Q. How did that occur?

"A. Each individual salesperson -- well, there are several ways it occurred. In the early years, we were always evaluated every year. We were brought in to individual meetings with Mr. Montgomery, who was then in charge of the sales organization of Bassett-Walker, and we were all individually quizzed as to what we were doing in our territories, and at that time, of course, we were experiencing some great sales growth and getting the name out into the marketplace and really built the name 'Bassett-Walker.' In later years, we were evaluated by our regional managers, I guess, once they set up that system.

"When I was an employee in 1990, '91 or 1990, they had some sort of an evaluation system, and then that was based on a bonus or something. I happened to get a half percent less than one of my former associates, and I thought they had a nice laugh over that. But, yes, there were ways of evaluating people.

"Q. And that was all done by Bassett-Walker personnel?

"A. Yes.

"Q. And were you required to obtain their approval as to when you were going to take your vacation?

"MR. FREEDMAN: Objection. At what period are you talking about?

"MR. WISEHART: Well, in the 1980s.

"A. Oh, yes, absolutely. They made it very clear in no uncertain terms when and when you could not take a vacation.

"Q. And did they provide trip itineraries?

"A. Yes.

"MR. FREEDMAN: Objection.

"Q. Did you call Bassett-Walker offices on a frequent basis?

"A. Daily.

"Q. And were sales representatives subject to termination by Bassett-Walker for unsatisfactory performance?

"MR. FREEDMAN: Objection.

"A. I would say yes. I know of some that were terminated because of poor performance in the territory, yes.

"Q. And were the sales representatives an integral part of Bassett-Walker's function?

"MR. FREEDMAN: Objection.

"A. Yes, we were part of the team.

"Q. Did they say that?

"MR. FREEDMAN: Move to strike.

"A. Yes.

"Q. Did they say that repeatedly?

"A. Repeatedly.

"Q. Was that said by more than one Bassett-Walker official?

"MR. FREEDMAN: Objection.

"A. Oh, absolutely.

"Q. What were the occasions when this statement was --

"A. Well, throughout our tenure at Bassett-Walker, we always felt as though we were the Bassett-Walker team, and we were told so by the management of Bassett-Walker. We grew up with the company, and we built the company, and we were told that we were the best sales force in the industry, and this was done repeatedly at sales meetings and in individual conferences, and I can't give you any real specific times, but this was a feeling that we had with the company.

"We were very close to the company, to the executives of the company, and felt as though we helped them build a business, and I think they were very much appreciative of what we did for them. We were part of the team.

"MR. FREEDMAN: Move to strike that as nonresponsive.

"Q. And did they say you were also part of the family?

"A. Yes.

"MR. FREEDMAN: Objection.

"Q. And did they, in the 1980s, after the V.F. takeover, require or indicate that they wanted you to represent Bassett-Walker exclusively?

"MR. FREEDMAN: Objection.

"A. Yes.

"Q. And did Derthick Associates give up or divest itself from other lines because of a request of Bassett-Walker?

"A. We did.

MR. FREEDMAN: Objection.

"Q. Can you account for the fact -- or do you know why Bassett-Walker didn't deduct social security taxes from your commissions?

"A. I would think that that was --

"MR. FREEDMAN: Objection. Go on. I am sorry.

"A. I would think that that would be probably a tax problem. They didn't want to pick up half of the social security tax, so they were getting around paying taxes.

"MR. FREEDMAN: I am going to move to strike the last answer.

"Q. And the compensation you received, what was its source?

"A. Bassett-Walker.

"Q. And did Bassett-Walker require that it approve all returned merchandise?

"A. Yes.

"Q. Did it require that it approve credit?

"A. Most definitely. The credit was handled by Bassett-Walker.

"Q. Did Bassett-Walker handle the customer-service function?

"MR. FREEDMAN: Objection.

"A. Yes, although we were a very big part of the customer service department. I mean, that was our job, as a liaison with our

customers.

"Q. Did Bassett-Walker have approval over hiring and firing of people who acted as sales representatives?

"MR. FREEDMAN: Objection.

"A. Yes. We had to clear any person that we were going to add to our sales group, our sales organization, by Mr. Montgomery. He wanted to interview them, and he did interview them, and he made sure that they were the right one for the team, as he would say.